

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSE MARIE SPENCE and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Albuquerque, NM

*Docket No. 01-880; Submitted on the Record;
Issued November 19, 2001*

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether appellant abandoned her hearing request.

On December 30, 1999 appellant, then a 53-year-old temporary postal clerk, filed a notice of occupational disease claiming that the pain in her thumb and joints was caused by her federal employment. Appellant stated that she was a temporary clerk during the holiday season and would "throw mail" for up to 12 hours a day, which caused pain in both of her thumbs. Appellant noted that she first realized her condition was caused by her employment in June 1998.

The employing establishment controverted appellant's claim because she waited more than three years to file it, she had not worked for the agency since December 31, 1996 and her preemployment physical indicated that she had arthritis in her hands dating back to 1985 and was diagnosed with "arthralgias distal fingers" in November 1996.

By letter dated January 14, 2000, the Office of Workers' Compensation Programs requested that appellant submit additional information in support of her claim.

By decision dated February 22, 2000, the Office denied appellant's claim on the grounds that the evidence of record was insufficient to establish fact of injury.

By letter dated March 18, 2000, appellant requested an oral hearing.

By letter dated October 21, 2000, the Office informed appellant that the oral hearing was scheduled for Thursday, November 30, 2000 at 1:00 p.m. at the federal courthouse in Albuquerque, NM. Appellant failed to appear.

By decision dated December 15, 2000, the Office deemed that appellant had abandoned her request for a hearing, noting that she received 30-day written notification of the hearing and there was no indication that she contacted the Office either before or after the scheduled hearing to explain her failure to appear.

The Board finds that appellant abandoned her request for a hearing.

Section 8124(b) of the Federal Employees' Compensation Act provides claimants under the Act¹ a right to a hearing if they request a hearing within 30 days of the Office's decision. Section 10.137 of Title 20 of the Code of Federal Regulations revised as of April 1, 1997 previously set forth the criteria for abandonment:

"A scheduled hearing may be postponed or cancelled at the option of the Office, or upon written request of the claimant if the request is received by the Office at least three days prior to the scheduled date of the hearing and good cause for the postponement is shown. The unexcused failure of a claimant to appear at a hearing or late notice may result in assessment of costs against such claimant."

* * *

"A claimant who fails to appear at a scheduled hearing may request in writing within 10 days after the date set for the hearing that another hearing be scheduled. Where good cause for failure to appear is shown, another hearing will be scheduled. The failure of the claimant to request another hearing within 10 days, or the failure of the claimant to appear at the second scheduled hearing without good cause shown, shall constitute abandonment of the request for a hearing."²

These regulations, however, were once again revised, effective January 4, 1999. The regulations now make no provision for abandonment. Section 10.622(b) addresses requests for postponement and provides for a review of the written record when the request to postpone does not meet certain conditions.³ Alternatively, a teleconference may be substituted for the oral hearing at the discretion of the hearing representative. The section is silent on the issue of abandonment.

The legal authority governing abandonment of hearings now rests with the Office's procedure manual. Chapter 2.1601.6e of the procedure manual dated January 1999 provides as follows:

"e. Abandonment of Hearing Requests.

"(1) A hearing can be considered abandoned only under very limited circumstances. All three of the following conditions must be present: the claimant has not requested a postponement; the claimant has failed to appear at a scheduled hearing; and the claimant has failed to provide any notification for such failure within 10 days of the scheduled date of the hearing.

¹ 5 U.S.C. § 8124.

² 20 C.F.R. §§ 10.137(a), 10.137(c) (revised as of April 1, 1997).

³ 20 C.F.R. § 10.622(b) (1999).

“Under these circumstances, H&R [Branch of Hearings and Review] will issue a formal decision finding that the claimant has abandoned his or her request for a hearing and return the case to the DO [District Office]. In cases involving prerecoupment hearings, H&R will also issue a final decision on the overpayment, based on the available evidence, before returning the case to the DO.

“(2) However, in any case where a request for postponement has been received, regardless of any failure to appear for the hearing, H&R should advise the claimant that such a request has the effect of converting the format from an oral hearing to a review of the written record.

“This course of action is correct even if H&R can advise the claimant far enough in advance of the hearing that the request is not approved and that the claimant is therefore expected to attend the hearing, and the claimant does not attend.”⁴

In this case, the Office scheduled an oral hearing at a specific time and place on November 30, 2000. The record shows that the Office mailed appropriate notice to appellant at her last known address and that her address had not changed between the date of her request on March 18, 2000 and the Office’s decision on December 15, 2000. The record also shows that appellant did not request postponement, that she failed to appear at the scheduled hearing, and that she failed to provide any notification for such failure within 10 days of the scheduled date of the hearing. Based on these facts, therefore, the Office properly concluded that under its procedures, appellant had abandoned her request for an oral hearing.

Appellant explained to the Board on appeal that she was given only five days’ notice of the hearing and thus she had no time to make arrangements to take time off from work. It is unclear from appellant’s letter which date she is alleging that she received notice of the hearing from the Office. In any event, it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.⁵ This presumption arises when the record shows that the notice was properly addressed and duly mailed.⁶ The appearance of a properly addressed copy in the case record, together with the mailing custom or practice of the Office itself, will raise the presumption that the original was received by the addressee.⁷ The record in this case contains no evidence, and appellant has proffered none that would rebut the presumption.

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.6e (January 1999).

⁵ *George F. Gidicsin*, 36 ECAB 175 (1984) (when the Office sends a letter of notice to a claimant, it must be presumed, absent any other evidence, that the claimant received the notice).

⁶ *Michelle R. Littlejohn*, 42 ECAB 463 (1991).

⁷ See *Larry L. Hill*, 42 ECAB 596 (1991). See generally Annotation, *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476, 481 (1986).

The December 15, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 19, 2001

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member